

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

Number: **200918014**  
Release Date: 5/1/2009

Third Party Communication: None  
Date of Communication: Not Applicable  
Person To Contact:

Index Number: 2056.01-00

ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-135912-08

Date:

December 17, 2008

Re:

Legend:

Decedent =

Spouse =

Trust =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear \_\_\_\_\_ :

This is in response to your letter dated July 28, 2008, from your authorized representative requesting a ruling that, pursuant to Rev. Proc. 2001-38, 2001-1 C.B. 1335, the qualified terminable interest property (QTIP) election made with respect to Decedent's estate is a nullity for federal estate, gift and generation-skipping transfer tax purposes.

### FACTS

Decedent created Trust on Date 1. Trust was amended on Date 2. Decedent died on Date 3, survived by Spouse. Paragraph 3 of Decedent's Last Will and Testament bequeaths certain tangible personal property to Spouse. Under the provisions of Paragraph 4 of Decedent's Will, the residue of Decedent's estate was bequeathed to Trust. Under the provisions of Trust, upon Decedent's death, a separate credit shelter trust was to be funded with "the largest amount that can pass free of federal estate tax." Decedent's total gross estate was less than the applicable exclusion

amount under § 2010(c) of the Internal Revenue Code. Accordingly, pursuant to the provisions of Trust, all of Decedent's estate (excepting tangible personal property disposed of under Paragraph 3 of Decedent's Will) was used to fund the Credit Trust.

On Schedule M of Decedent's United States Estate (and Generation-Skipping Transfer) Tax Return, Form 706, a QTIP election under § 2056(b)(7) was made with respect to a portion of the property in Credit Trust. Decedent's estate received an estate tax closing letter from the Internal Revenue Service on Date 4 indicating that no tax was due. It was subsequently discovered that the QTIP election was made and that the election was not necessary to reduce the estate tax liability to zero.

You request a ruling that the QTIP marital deduction election taken on Decedent's federal estate tax return be treated in its entirety as null and void for federal estate, gift, and generation-skipping tax transfer purposes.

### LAW AND ANALYSIS

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, except as limited by § 2056(b), the value of the taxable estate is to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate. Section 2056(b)(1) provides the general rule that a marital deduction is not allowed for an interest passing to the surviving spouse that is a "terminable interest." An interest is a terminable interest if the interest passing to the surviving spouse will terminate or fail on the lapse of time or on the occurrence of an event or contingency or on the failure of an event or contingency to occur and, on termination, an interest in the property passes to someone other than the surviving spouse.

Section 2056(b)(7) provides an exception to this terminable interest rule in the case of QTIP. For purposes of § 2056(a), QTIP is treated as passing to the surviving spouse, and no part of the property is treated as passing to any person other than the surviving spouse. Under § 2056(b)(7)(B)(i), QTIP is property which passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(v) provides that the election to treat property as QTIP under § 2056(b)(7) is made by the executor on the return of tax imposed by § 2001. The election, once made, is irrevocable.

Section 2044(a) and (b) provide that the value of the gross estate includes the value of any property in which the decedent had a qualifying income interest for life and with respect to which a deduction was allowed for the transfer of the property to the decedent under § 2056(b)(7).

Section 2519(a) and (b) provide that any disposition of all or part of a qualifying income interest for life in any property with respect to which a deduction was allowed under § 2056(b)(7) is treated as a transfer of all interests in the property other than the qualifying income interest. Section 2652(a) provides that, in the case of property subject to an election under § 2056(b)(7), the surviving spouse will be treated as the transferor of the property for generation-skipping transfer tax purposes in the absence of a "reverse QTIP" election under § 2652(a)(3).

In general, under Rev. Proc. 2001-38, a QTIP election under § 2056(b)(7) will be treated as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652, where the election was not necessary to reduce the estate tax liability to zero, based on values as finally determined for federal estate tax purposes. The revenue procedure provides an example where a QTIP election was made when the taxable estate (before allowance of the marital deduction) was less than the applicable exclusion amount under § 2010(c). Another example set forth in the revenue procedure is where the decedent's will provides for a "credit shelter trust" to be funded with an amount equal to the applicable exclusion amount under § 2010(c), with the balance of the estate passing to a marital trust intended to qualify under § 2056(b)(7). The estate makes QTIP elections with respect to both the credit shelter trust and the marital trust. The QTIP election for the credit shelter trust was not necessary, because no estate tax would have been imposed whether or not the QTIP election was made for that trust. See Rev. Proc. 2001-38, section 2.

In this case, the QTIP election was not necessary to reduce the estate tax liability to zero. That is, the estate tax liability would have been zero whether or not the election was made because Decedent's estate was below the applicable exclusion amount under § 2010(c). Accordingly, we rule that the QTIP election is null and void for purposes of §§ 2044, 2056(b)(7), 2519 and 2652. The property held in Trust will not be includible in the gross estate of Spouse under § 2044, and Spouse will not be treated as making a gift under § 2519 if Spouse disposes of the income interest with respect to that property. Further, Spouse will not be treated as the transferor of the property in the Trust for generation-skipping transfer tax purposes under § 2652(a).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In addition, we express or imply no opinion regarding the value of the property transferred to the trusts.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for the ruling, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Lorraine E. Gardner  
Senior Counsel, Branch 4  
Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosures

Copy for § 6110 purposes  
Copy of this letter

cc: